STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2007
v	No. 269154 Kent Circuit Court
TERRILL ANTHONY BIRD, Defendant-Appellant.	LC No. 05-008901-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree murder, MCL 750.316, kidnapping, MCL 750.349, and unlawful driving away of a motor vehicle, MCL 750.413. He was convicted on February 6, 2006 following a jury trial and was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment without parole for two counts of first-degree murder, life imprisonment with possibility of parole for kidnapping, and 80 to 120 months' imprisonment for unlawful driving away. We affirm.

Melissa Friar and her eight-year-old daughter Alana were found dead in their home. Melissa's four-year-old son Jonathan was found several miles away, on the back porch of a vacant home, the same morning. Melissa's ex-boyfriend, Shannon Bell, is Jonathan's father and defendant's half brother. Defendant later admitted taking both Jonathan and a car, which Melissa borrowed from her mother the night before the bodies were found. Defendant, however, denied killing Melissa or Alana. He claimed that drug dealers murdered the two and forced defendant and Jonathan to leave with them in the borrowed car.

Defendant first argues that he was denied his constitutional right to counsel because the trial court denied his motion to adjourn the trial and allow a substitution of counsel. We disagree. Although an issue of constitutional law is reviewed de novo, a court's exercise of discretion regarding a defendant's choice of counsel is reviewed for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003).

The constitutional right to counsel encompasses the right of a defendant to choose his own retained counsel. US Const, Am VI; US Const, Am XIV; 1963 Const, art 1, §§ 13 and 20; *US v Gonzalez-Lopez*, ___ US ___; 126 S Ct 2557, 2561; 165 L Ed 2d 409 (2006); *Akins*, *supra* at 557. However, the right is not absolute, and a court must balance the defendant's right to choice of counsel against the public's interest in the prompt and efficient administration of

justice. *Id*. Furthermore, a trial should not be adjourned except for good cause shown. *People v Sekoian*, 169 Mich App 609, 613; 426 NW2d 412 (1988). To determine whether there is good cause to adjourn, the Court considers whether (1) defendant is asserting a constitutional right; (2) there is a legitimate reason to assert the right; (3) defendant was negligent for not asserting the right earlier; (4) defendant requested other adjournments; and (5) defendant has demonstrated prejudice from the trial court's refusal to adjourn. *People v Wilson*, 397 Mich 76, 80; 243 NW2d 257 (1976); *Akins, supra*; *Sekoian, supra* at 613-614. A trial court may not "unreasonably interfere with a client's right to be represented by the attorney he has selected" solely in the name of calendar control. *Wilson v Mintzes*, 761 F2d 275, 280-281 (CA 6, 1985). If the deprivation of defendant's right to retained counsel of his choice is erroneous, it is a structural error requiring reversal. *Gonzalez-Lopez, supra* at 2564.

We find that the trial court did not err when it denied the motion for an adjournment. Defendant waited to assert his right to hired counsel the day before trial. He claimed he could not have asserted his right earlier because his family had just provided the funds to hire counsel. Regardless, defendant's proffered rationale for new counsel was only that he thought he would get a better trial with retained counsel. He offered no specific reason for dissatisfaction with his appointed counsel. He did not mention that there were irreconcilable differences and did not complain that appointed counsel was inadequate. In fact, his appointed counsel did not wish to withdraw, and defendant appears to concede on appeal that appointed counsel was competent. Moreover, the attorney of defendant's choice was not available for trial on the scheduled day and did not return a telephone call from the court seeking to determine if he was ready to proceed as counsel. Further, the only prejudice defendant asserts is that he was forced to proceed with counsel not of his own choosing. Finally, the trial court stated that defendant's retained counsel could serve as co-counsel once he appeared before the court. Thus, defendant was not precluded from using his hired counsel's services. After examining the record, we conclude that the trial court did not abuse its discretion when it denied the motion to adjourn the trial. Good cause was not shown. Additionally, defendant's right to counsel of his own choice was not violated. The trial court balanced defendant's last minute request to hire counsel with the public's interest in the prompt and efficient administration of justice. *Akins, supra.*

Defendant argues that the trial court's "compromise" of allowing retained counsel to act as co-counsel did not cure the violation of his right to the counsel of his choosing. He cites *People v Humbert*, 120 Mich App 195; 327 NW2d 435 (1982). *Humbert* is distinguishable from this case because the trial court there held that retained counsel was limited to consulting with appointed counsel; he could not present evidence or question witnesses at the preliminary examination. *Id*. at 197-198. No such limits were placed on defendant's choice of counsel. The trial court in this case struck an appropriate balance between the defendant's rights and the need to proceed as scheduled, given the lack of prior notice and the prosecution's readiness for trial, with its ruling that retained counsel could act as co-counsel. *Akins, supra.*

Defendant also argues on appeal that his counsel was ineffective for failing to object to the admission of testimony regarding defendant's nephew's behavior at the preliminary hearing. Eric Friar, Melissa's brother, testified that when defendant entered the courtroom at the preliminary hearing, Jonathan became very frightened. Jonathan had been sitting on Eric's lap, and when he saw defendant, he slid off and tried to hide under the witness table. He crawled to a

door and attempted to leave the courtroom. When that door would not open, he crawled back behind the judge and attempted to leave by another doorway.

To claim ineffective assistance of counsel on appeal, a defendant must raise the issue below by filing a motion for an evidentiary hearing or a new trial. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant failed to do either, we consider the issue only to the extent that counsel's claimed mistakes are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Defendant must also show that the court committed plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient under an objective standard of reasonableness, and that, but for counsel's error, the outcome of the trial would have been different and therefore, he was denied a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Defendant bears a "heavy burden" to overcome the presumption that counsel was effective. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Counsel is not ineffective for "failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant specifically argues that counsel should have objected because the challenged testimony was inadmissible hearsay, was more prejudicial than probative, and violated defendant's confrontation rights as articulated in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 177 (2004).

Nonverbal actions and conduct may be hearsay if the conduct is intended to be an assertion. The first step to determine whether conduct is hearsay to determine whether an assertion is actually intended by the conduct. *People v Watts*, 145 Mich App 760, 762; 378 NW2d 787 (1985). The party claiming that the conduct was a statement and hearsay bears the burden of showing that an intention existed. *Id.* "Ambiguous cases will be resolved in favor of admissibility." *Id.* In *People v Davis*, 139 Mich App 811, 812-813; 363 NW2d 35 (1984), this Court held that testimony that the child victim burst into tears when confronted about the defendant's sexual abuse was not hearsay because there was no "indication that the victim intended to make an assertion by her spontaneous act of crying." We likewise conclude in this case that Jonathan did not intend an assertion by his spontaneous attempt to escape the courtroom. Four-year-old Jonathan was afraid, but defendant has not provided any evidence that Jonathan intended an assertion by his conduct. The evidence was not a "statement" and thus, was not inadmissible hearsay.

Defendant also argues that the testimony about Jonathan's behavior was more prejudicial than probative and merely inflamed the jury. Evidence is admissible if it is relevant and its probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury . . . ." MRE 402; MRE 403. All evidence is prejudicial to some extent to one of the parties. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). "Damaging" is not the equivalent of unfair "prejudice." *Bradbury v Ford Motor Co*, 123 Mich App 179, 185; 333 NW2d 214 (1983), mod 419 Mich 550 (1984). Rather, unfair prejudice is when there is a danger that marginally probative evidence will be given undue weight by the jury, and it would be inequitable to allow its use. *Mills*, *supra* at 75-76. In this

case, there was some indication that Jonathan saw what happened on the night his mother and sister were killed. He was unable to testify at trial, but his fear of his uncle was much more than marginally probative to the fact that his uncle was involved in the crimes. Defendant testified that "If I did it, my nephew would have seen it all." Jonathan's behavior supported that this was true. Moreover, it disproved testimony that Jonathan was "chillin" in the back seat of the car after the murders. The evidence was not merely marginally probative evidence, and the record does not support that any prejudice substantially outweighed the probative value.

Finally, defendant is correct that the confrontation clause bars the admission of testimonial statements from a witness who is not available for cross-examination at trial. *Crawford, supra* at 53-54. Nonverbal conduct may be a "statement" and the admission of such a "statement" may implicate confrontation clause rights. *Id.*; *Davis, supra* at 813. However, as noted above, conduct is only a "statement" if it is intended to be an assertion, *Watts, supra* at 762; *Davis, supra* at 812-813, and Jonathan did not intend his conduct to be an assertion. Defendant's confrontation clause argument is without merit.

We conclude that the testimony was properly admitted. Because the testimony was admissible, defense counsel was not ineffective for failing to object to its admission. *Mack, supra* at 130. Defendant's right to effective assistance of counsel was not violated.

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen